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IN THE

Supreme Court of the United States

October Term—1948

No. 351

ROBERT A. MCALLISTER,

Respondent,

—v.—

COSMOPOLITAN SHIPPING CO. INC.,

Petitioner.

BRIEF FOR RESPONDENT

Facts

Robert A. McAllister, respondent, is 28 years of age, married and has two children (fol. 304). He was hired by the Cosmopolitan Shipping Co., in the capacity of second assistant engineer (fols. 311-12). After having been given a physical examination (fols. 974, 1677), he boarded the SS EDWARD B. HAINES. McAllister was directly hired by Cosmopolitan Shipping Co., at that company's office, and signed articles at the line indicated without being informed and without knowing that the owner of the vessel was the United States of America, and believed and continued to believe from the start to the termination of the voyage that Cosmopolitan Shipping Co. was his sole employer (fols. 312, 313, 320, 321, 326). The other members of the crew likewise believed that Cosmo-

politan Shipping Co. Inc., was their employer (fols. 153, 267, 268, 969, 1012, 1013). (See also folios 1443 to 1445, with reference to the method of hiring engineers by Cosmopolitan Shipping Co.)

The HAINES sailed from New York City on July 24, 1945 (fol. 83) bound for the Far East. Upon arrival at Shanghai on September 26, 1945, notices were posted by the Captain which stated that there was an epidemic in the area of polio or infantile paralysis, as well as other diseases (fols. 86, 88, 278, 327, 992-3).

During the vessel's stay in the Port of Shanghai, beginning on September 26, 1945, a large number of Chinese came aboard to do stevedoring work and deck work, in addition to about 100 Chinese passengers (fols. 104, 272-4, 329, 999, 1624), of which 125 remained with the vessel on its trip to Tsing Tao (fol. 110). These included 75 persons described by appellant on page 5 of its brief to the Court of Appeals for the Second Circuit as "Chinese military truck drivers".

Everybody aboard used common toilet facilities (fols. 113, 280-283, 331, 996), common cooking utensils (fol. 114) and a common drinking fountain (fols. 282, 329). A wooden shed was constructed on the deck of the vessel, with a trough as a temporary latrine for the Chinese (fols. 110, 280, 996, 998), in the vicinity of which McAllister was compelled to work (fols 329, 330).

McAllister did not go on shore leave for over one month before he finally was sent to a hospital on December 1st (fols. 251, 586), or about 2 to 3 weeks before the vessel returned to Shanghai on November 11th (fols. 586-7). The petitioner's medical expert stated that the average incubation period of polio is 12 to 14 days (fol. 1215). McAllister began to feel ill on November 11th (fol. 594). Consequently, it follows that the polio virus was trans-

mitted to McAllister while he was aboard the vessel in the company of the aforesaid Chinese. Respondent's medical expert testified that the disease was introduced aboard the vessel while it was at Shanghai (fols. 469, 470).

On November 22nd the Chief Mate, George A. Linnartz, who was aware of the polio epidemic (fols. 126-127) notified the Master of the SS EDWARD B. HAINES that McAllister appeared to be paralyzed (fol. 125) and that he might have polio (fol. 128).

Medical attention was available from 3 different sources in close proximity to the vessel (fols. 129, 131). Nevertheless, the Master deferred medical attention for McAllister (fol. 133) until Dec. 1, 1945 (fols. 221, 1819) for the reason expressed by the Chief Mate that the Captain feared being short-handed (fol. 143). The vessel was in the Port of Shanghai all of the day, November 22nd, when notice of McAllister's serious illness was brought to the attention of the Master, and did not sail for Tsing Tao until the following day, November 23rd (fol. 579).

The medical experts established the fact that such delay in furnishing prompt, adequate and proper nursing care and medical attention resulted in weakness, loss of resistance to combat the effects of the virus, pain and suffering, permanent preventable defects consisting of paralysis, contractures and deformities (fols. 663-669, 678-681, 685, 686, 1237, 1238, 1240, 1241, 1252, 1254, 1257, 1338-1341).

One of the doctors called on behalf of McAllister, Dr. John A. DiFiore, who was Chief of Neurology at the United States Government England General Hospital during the war and in charge of the polio ward (fol. 642), stated that McAllister was suffering from:

> " * * * marked atrophy or wasting of all the muscle groups of both lower extremities, with complete paralysis, with the exception of some motion in extending

the right toes and foot. All the deep reflexes in the leg were absent.

There was partial atrophy and paralysis of the left pectoralis muscle—that is the anterior chest muscle—the left triceps and the left bicep muscles, with weakness in the function" (fols. 647, 648).

He and Dr. Samuel Frant, Deputy Commissioner of Health stated that McAllister, for practical purposes had no use of his lower extremities, required the use of braces from his waist down to his toes, required crutches to get about, and had weakness of his left upper arm (fols. 481, 482, 650).

The medical proof further established the fact that the condition was permanent, and the proof was that but for the fault of the vessel, McAllister would have recovered sufficiently to return to sea and would not have had joint stiffness or deformities (fols. 650, 651, 685, 686, 905-907).

The jury awarded a verdict of $100,000.00 in favor of McAllister on the first cause of action, based on the Jones Act. There was no recovery for maintenance, the verdict on this cause of action being returned in favor of the petitioner.

Petitioner appealed from the judgment with respect to the first cause of action, and respondent appealed from the judgment in favor of the petitioner on the second cause of action.

The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court as to both appeals. Its opinion by Judge Augustus N. Hand, Circuit Judge, is reported at 169 F. (2) 4.

The case comes before this Court on petition for writ of certiorari granted November 22, 1948, to review the decision of the Court below.

The Question Before This Court

The question before this Court is whether the provisions of the *Clarification Act* (50 U. S. C. 1291; 57 Stat. 45) in their prospective application, limit a seaman in an action predicated on a maritime tort, while employed aboard a vessel operated by a private company under a General Agency Agreement, to an action in Admiralty against the United States of America, and deprive him of his remedy as provided by Congress in the *Jones Act* (46 U. S. C. 688; 38 Stat. 1185, 41 Stat. 1007).

POINT I

The Solicitor General is endeavoring to reargue the questions heretofore resolved by this Court in the case of *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707.

The *Hust* case, *supra,* under the doctrine of stare decisis is determinative of all the issues in the present case, except the question of the effect of the Clarification Act during its prospective period of operation.

Learned counsel for the Government has gone to great length in his endeavor to have this Court reverse itself.

There are no changed circumstances pointed out by petitioner in support of its attempt to reargue the questions decided in the *Hust* case, *supra.*

As a matter of fact, the very reasons which prompted the dissent in the *Hust* case, *supra,* no longer exist. Petitioner itself concedes as follows on page 36 of its brief, footnote 13, that the Jones Act refers only to:

> " * * * 'any seaman who shall suffer personal injury in the course of his employment' (46 U. S. C. 688) and by

its terms does not seem to require a common-law-employer-employee relationship."

The Clarification Act restricted a seaman's remedy when directed against the United States of America for torts committed on either merchant or public vessels, to the Suits in Admiralty Act, 41 Stat. 525; 46 U. S. C. 741-745, but did not in anywise make such remedy exclusive or modify or abridge a seaman's remedy enforceable against a General Agent under the Jones Act.

Petitioner urges that national and international interests of the United States affecting the immunity of Government vessels in foreign ports, as well as immunity from regulations and taxation by local Governments might be raised were the agent held subject to liability for damages by a seaman injured on a vessel operated by it under the aforesaid agency agreement.

It is respectfully submitted that the mere fact that the agent is held liable to a seaman under the Jones Act does not in and of itself determine all the multifarious aspects of operation and control of War Shipping Administration vessels. The United States Government is for purposes of international law, as well as for purposes of State legislation, deemed the owner in control of War Shipping Administration vessels. It is a perfectly familiar legal situation that for purposes of the Jones Act, the General Agent may be held liable for maritime torts occurring aboard vessels under a General Agency Agreement, while for other purposes the Government is held to be the owner in control.

Mr. Justice Frankfurter in the case of *Caldarola* v. *Eckert*, 332 U. S. 155 stated on page 159 that:

"The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel."

distinguishing the case of a seaman suing a General Agent under the Jones Act.

All contentions of the petitioner with respect to alleged disadvantages that would accrue in the absence of *in camera* admiralty proceedings were known to Congress prior to the passage of the Clarification Act, and that body in its wisdom decided after weighing the advantages and disadvantages involved not to foreclose seamen from their right to a trial by jury against the General Agent under the Jones Act. Congress, by statute, has the power, if it so desires, to exclude various documents and information from use as evidence in courts of law. Petitioner failed to cite a single instance where the Government was in fact caused to sustain financial loss, or suffer seizure of Government owned vessels in foreign ports, or subjected to embarrassment by disclosure of secret and confidential documents by reason of the holding in the *Hust* case, *supra*.

The question of interference with Government vessels in time of emergency has now become moot.

The issue of the right of a state to withhold tax from seamen's wages has been decided against the state in the case of *American Hawaiian Steamship Co.* v. *Fisher, as Commissioner and Chairman of the Oregon State Tax Commission*, not officially reported, unofficially reported in 1948 American Maritime Cases 1987 (November 1948). There being no liability of steamship companies for withholding taxes, there can be no claims for reimbursement to said companies by the Government.

POINT II

The employment status of a seaman was not change by the Clarification Act. He was "technically" th employee of the Government before as well as afte the effective date of the Clarification Act. This Cou has held that a seaman did not lose his remedy agains the agent by reason of a "technical" employment.

Respondent concedes that he was the employee of th United States, during the periods of retrospective and pr spective operation of the Clarification Act. The Clarifica tion Act does not alter the employment status of the sea man or the employment relationship between the seama and the Government.

The majority of this Court in the *Hust* case, *supra,* hel that a seaman had the right to maintain a Jones Act caus of action against the General Agent. Mr. Justice Ree in his dissenting opinion, concurred in by Mr. Justic Frankfurter and Mr. Justice Burton, while denying th existence of a Jones Act remedy against the General Agen affirmatively stated that the Clarification Act had no bear ing on the existing rights and remedies against said Genera Agent.

The holding of the *Hust* case, *supra,* is equally applicabl to both the aforementioned periods. In the *Hust* case *supra,* the Court stated on page 724 as follows:

> "But it does not follow from the fact that Hust was tech nically the Government's employee that he lost al remedies against the operating 'agent' for such injuries as he incurred."

The petitioner argues again as it did in the *Hust* case, *supra*, that the nature of the General Agent's authority is such that in private litigation it would not have liability for torts committed aboard War Shipping Administration vessels. Nothing in the Clarification Act modifies the laws of agency, as interpreted in the *Hust* case, *supra*, where on pages 724, 725 the following appears:

> "Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common law rules of private agency. It is true these are applied in the normal everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without the covered class in the Act's normal operation, not to exclude that class entirely or in large part. Here the application is made to defeat the Act for all except the smaller number of men whom it was enacted to protect. No such application of the common-law 'control' test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.'"

McAllister's rights are not governed by the common-law rules of private agency. Nothing in the Clarification Act imposes an obligation on him to establish his cause of action pursuant to common-law rules of agency. He had an identical burden of proof as did Hust in the *Hust* case, *supra*. For the purposes of the Jones Act, McAllister is considered as having all the rights and remedies of a seaman against the Cosmopolitan Shipping Co. Inc., irrespective of the fact that he is a "technical" employee of the United States of America. In administering rights and remedies under Federal Acts, entities which are in fact not employers, may

for the purposes of the Act be regarded as employers. The "in fact" relationship between McAllister and the Cosmopolitan Shipping Co. Inc., has been recognized in the right of merchant seamen on War Shipping Administration vessels to "invoke the dispute jurisdiction of the National War Labor Board as fully as if employed on privately operated vessels" (p. 74, petitioner's brief).

The War Labor Board in its Directive Order of August 31, 1945, *In re Maritime Cases*, 26 War Lab. Rep. 509, 512, set forth in footnote 36 of petitioner's brief, states as follows:

> "The question raised as to whether the operators should be named in the contract as employers, or, as in the last contract, as general agents for the War Shipping Administration, has no real significance. Whatever the designation in the contract, the operators are the employers for the purpose of this dispute, as contemplated by the War Labor Disputes Act."

The footnote sets forth further that Section 2 of the National Labor Relations Act, followed by the War Labor Disputes Act, defines an employer as "any person acting in the interest of an employer, directly or indirectly".

In the Labor Management Relations Act, 1947, as amended, commonly known as the Taft-Hartley Act, 29 U. S. C. A. Sec. 152 (2), is found the following definition of "employer":

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly * * *."

Similarly, in the Fair Labor Standards Act of 1938, commonly known as the Wagner Act, 29 U. S. C. A. Sec. 203 (d), is found the following definition of "employer":

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *"

Petitioner admits in the footnote on page 75 of its brief that Congress prior to the passage of the Clarification Act "specifically examined and approved" the definitions of "employer" as found in the National Labor Relations Act and the War Labor Disputes Act.

Nowhere in petitioner's brief can be found any factual distinction between the functions of agents under the so-called Roosevelt form of agreement of the *Brady* v. *Roosevelt Shipping Corporation* case, 317 U. S. 575, and the GAA 4-4-42 form of agreement of the *Hust* case, *supra*. The distinction lies only in the phraseology of the agreements themselves, by and between the Government and the General Agent, obviously not changing the relationship between the General Agent and non-signatory merchant seamen.

In many respects the Operations Regulations set forth on page 86 *et seq.* of petitioner's brief, conclusively show that the General Agent's functions did not stop at the water's edge. For example, Regulation No. 58, page 93 of petitioner's brief, "concerns the status of military and naval personnel assigned aboard merchant vessels and directs the general agents to *instruct* the masters in connection with and to comply therewith".

The facts in the case at bar show that about seventy-five Chinese *military* truck drivers had been taken aboard the vessel. The presence of carriers from an infected area was determined as a proximate cause of McAllister's disability. Regulation No. 58 directly imposes the responsibility on the General Agent for the conduct of the Master with reference to the presence of the military personnel. The peti-

tioner is liable for its breach of duty, as provided by Regulation 58, in failing to instruct the Master as to his conduct with relation to military personnel, which violation by the petitioner was a proximate or contributing cause of McAllister's illness.

Thus, petitioner is liable not only under the decision as laid down by the majority of this Court in the *Hust* case, *supra*, but is likewise liable under the principle advanced by the minority that an action could be maintained against an agent at common-law for the agent's own torts, on the authority of the *Brady* case, *supra*.

In the light of the provisions of GAA 4-4-42 for reimbursement to General Agents for disbursements for and on account of *damages or compensation for death or personal injury or illness* (Exhibit G, Art. 7, fol. 1842, p. 81 of petitioner's brief), indemnification of General Agents for *damages for personal injury or loss of life* (Exhibit G, Art. 16, fol. 1859, p. 83 of petitioner's brief), insurance coverage of General Agents at Government expense *against all insurable risks, including marine, war and protection and indemnity risks* (Exhibit G, Art. 8, fols. 1846, 1847, p. 158 of petitioner's brief), the logical conclusion, as held by this Court, is that the General Agent is liable to a seaman under the Jones Act.

Technically, McAllister was an employee of the Government, but actually, Cosmopolitan Shipping Company, Inc., exercised as much control as any operating steamship company of its own vessels during the war emergency period. Moreover, all that is required in Federal practice is substantial control, *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, c. d. 314 U. S. 682, as distinguished from N. Y. State law which requires complete and exclusive control. *Cullings* v. *Goetz*, 256 N. Y. 287; *Caldarola* v. *Eckert*, 332 U. S. 155.

POINT III

The remedy of a seaman to recover from the General Agent under the provisions of the Jones Act was not destroyed and taken away from the seaman by the Clarification Act. The Clarification Act deals with the method of proceeding against the Government, and not with the exclusiveness of rights and remedies.

The purpose of the Clarification Act was the "clarification" of the rights and remedies of a seaman against the United States Government, and did not at all touch upon the rights and remedies of a seaman against a General Agent. The Clarification Act did not change the existing law as interpreted by the United States Supreme Court in the *Hust* case, *supra,* in which respect the dissenting opinion concurred.

The remedy of a seaman to recover from the General Agent under the provisions of the Jones Act was not destroyed and taken from the seaman by the Clarification Act. To do so Congress was required to use clear and unequivocal language as pointed out by the United States Supreme Court in the *Brady* case, *supra.*

Immunity cannot be asserted by the General Agent as a bar to seamen's rights and remedies under the Jones Act without specific Congressional enactment. Reference to the retrospective period from October 1, 1941 to the date of the enactment of the Clarification Act, March 24, 1943, was exclusively addressed to furnishing a measure of protection to seamen, at least as against the Government, without reference to any other remedies against other entities. This was necessitated by the uncertainty created by the unique status of seamen, as a result of the war emergency.

The judicial suggestion in the *Brady* case, *supra*, that for Congress to effect a "substantial dilution of the rights of claimants" (p. 581), by granting immunity from suit to private operators of government owned vessels, there must be clear and unambiguous legislation, has been repeated by the United States Supreme Court in the *Hust* case, *supra*, as follows:

> "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. Brady v. Roosevelt S.S. Co., supra, 317 U. S. at 580" (p. 722).

This Court pointed out in the *Hust* case, *supra*, that the Clarification Act and its legislative history did not contain a "clear and unequivocal command", by stating as follows:

> "It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that action should be taken by congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them."
>
> "The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer" (p. 733).

It is clear from the Congressional Committee Reports that the *Brady* case, *supra*, was known to Congress, and its holding carefully considered at the time of the passage of the Clarification Act. Had Congress intended to grant immunity to General Agents it would have done so in clear and unambiguous language.

It is apparent from Committee Reports that Congress recognized the possibility that General Agents would be held to have an independent liability for torts. Instead of granting immunity from suit to the General Agents, Congress was scrupulously careful to so amend the existing law as to provide for indemnification for General Agents in the event of a decision just such as the *Hust* case, *supra*. This legislation obviously does not meet the test of disturbing existing rights and remedies only by "clear and unequivocal command."

One of the most recent decisions in the lower Courts was by Hon. Harold R. Medina, in the case of *Warren* v. *United States of America, et al.*, 76 F. Supp. 735, 736, memorandum on motion for rehearing dated March 4, 1948, wherein he stated:

> "Respondent American South African Line Inc. now urges for the first time that the Clarification Act is a bar to libellant's recovery. But by the weight of authority and the weight of reason too the Clarification Act will not bear the construction which respondent would give it with respect to rights arising after the date it took effect."

Heretofore, the Government has consistently conceded that the Clarification Act in nowise affected the right and remedy of a seaman to maintain an action for a maritime tort against a General Agent. The Government, as *Amicus*

Curiae in the case of *Fink* v. *Shepard Steamship Company*, 192 P. (2d) 258, took the position which is described by the Oregon Supreme Court in the following language:

> "The Government, in its brief, takes the position that the Clarification Act 'has no bearing on the present case'" (p. 270).

Again as *Amicus Curiae* in the cases of *McGowan* v. *J. H. Winchester & Co. Inc.*, and *Buro* v. *American Petroleum Transport Corp., et al.*, 168 F. (2d) 924, on page 29 of its brief, the Government referring to the agent being considered owner *pro hac vice*, stated as follows:

> "In Caldarola (*Caldarola* v. *Eckert*, 332 U. S. 155),* the Supreme Court dispelled this confusion. The Court reaffirmed that by reason of the manner in which the agency agreement requires them to procure seamen for the United States, the general agents are 'employers' of the seamen within the technical meaning of the Jones Act so that an injured seaman can bring the statutory action against such an 'employer' (See 332 U. S. at 159)."

Nowhere in the previous briefs of the Government is there any comment that the Clarification Act changed the law as interpreted by the United States Supreme Court in the *Hust* case, *supra*.

The Government's position in the instant case before the Court below is set forth in its opinion as follows:

> "Moreover, it is to be noted that the Government in its brief as amicus curiae makes no claim that the Clarifi-

* Words in parentheses added.

cation Act has any bearing on the plaintiff's right of recovery" (p. 8).

No reference is made in the Clarification Act to liabilities of General Agents and nothing is said as to the rights and remedies of seamen against such General Agents. Such omission is of the utmost significance as is pointed out by this Court in the *Brady* case, *supra*, pages 580, 581 as follows:

> "We may also assume that it (Congress) would have the power to grant immunity to private operators of government vessels for their torts. But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture."

This Court in the *Hust* case, *supra*, did not actually decide the effect of the Clarification Act prospectively, but it did express its views in no uncertain language at the close of the majority opinion, as follows (pp. 733, 734):

> "Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost."

Judges Learned Hand, Thomas W. Swan and Harrie B. Chase, Circuit Judges for the Court of Appeals, Second Circuit have followed the decision in the instant case in the case of *Francis J. Mulligan, Public Administrator (James Brodie Hutchison, deceased)* v. *Eastern Steamship Lines,*

Inc., not officially reported, unofficially reported 1948 American Maritime Cases 1924 (November 30, 1948).

There is no doubt that Congress fully appreciated the purport of the *Brady* decision to the effect that clear and unequivocal language must be used to abridge or limit a seaman's right or remedy.

H. R. 483, 81st Congress, 1st Session, annexed hereto as Exhibit A, and H. R. 4873, 80th Congress, 2nd Session, annexed hereto as Exhibit B, express under Section 5 thereof, *as contrasted with the language of the Clarification Act*, an intent by clear and unequivocal command to make the remedy exclusive under the Suits in Admiralty Act. Said language is as follows:

> "Sec. 5 * * * That where a remedy is provided by this Act it shall *hereafter be exclusive* of any other action by reason of the same subject matter against the agent or employee of the United States * * * " (Italics ours.)

Any action that may be predicated on the above proposed statute may hereafter be maintained only against the United States of America.

The Clarification Act provided the method whereby a seaman injured on either a merchant or a public vessel could enforce his remedy against the United States of America, to wit, by an action under the Suits in Admiralty Act. Congress did limit the method of obtaining redress against the United States of America, but nowhere in the language of the Act or in the debates of Congress preceding the enactment of the Clarification Act is there to be found an intention to curtail, limit or even define either the rights or remedies that a seaman had or would continue to have against a private operator acting as a General Agent.

POINT IV

The judicial and legislative background of the Clarification Act indicates a liberal trend as exemplified by the *Hust* case, *supra*.

Petitioner seeks to resurrect the law declared in the case of *Lustgarten* v. *United States Shipping Emergency Fleet Corp., et al.*, 280 U. S. 320, which has been specifically reversed by this Court in the *Brady* case, *supra*.

In the *Lustgarten* case, *supra*, decided in 1930, this Court held that the Suits in Admiralty Act precluded suits against the Fleet Corporation and its agents for their maritime torts arising out of the operation of merchant vessels.

The decision deprived relief to many claimants who had theretofore sued the corporation or its agents in reliance upon the prevailing theory as to the law, and whose rights to bring suit against the Government after the date of the decision had expired. As a result, Congress enacted Public Law 213 of the 72nd Congress, which revived for such claimants their rights to institute suits against the Government within a stated time. The statute referred to, however, did not legislatively settle the question of the exclusiveness of the remedy.

In 1942, in the *Brady* case, *supra*, this Court held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the agent from liability for his own torts. The Court held that the Suits in Admiralty Act did not provide the exclusive remedy for maritime torts arising out of the operation of merchant vessels by agents of the Government.

This Court in the *Caldarola* case, *supra*, although at variance as to other features, unanimously concurred in

and approved the principle established in the *Brady* case, *supra*, that the Suits in Admiralty Act was not the exclusive remedy in actions for maritime torts arising on vessels operated by Government agents.

The holding of the *Brady* case, *supra*, viewed as a holding that the agent was suable, without reaching "the different question" whether "a cause of action" against the agent had been established, was expanded in the *Hust* case, *supra*, which holds not only that the agent is suable and that the Suits in Admiralty Act is not an exclusive remedy, but further holds that the General Agent is liable for maritime torts notwithstanding the fact that the General Agent is not the technical employer of the seaman, and notwithstanding the fact that the General Agent would not be liable under the common-law rules of private agency.

Mr. Justice Frankfurter in the *Caldarola* case, *supra*, stated: "it (referring to the *Brady* case)* merely held that the Suits in Admiralty Act, by furnishing an in personam remedy against the United States, did not free the Agent from liability for his own torts. The Brady case did not reach the 'different question' whether 'a cause of action' against the Agent had been established" (p. 160).

This Court in the *Caldarola* case, *supra*, recognized that a General Agent was suable for its own torts. In the *Hust* case, *supra*, this Court reached the "different question" insofar as a seaman was concerned, and held that the General Agent was liable under the Jones Act irrespective of the fact that the General Agent was not the "technical" employer of the seaman, and irrespective of the fact that the General Agent would not be liable under the common law rules of private agency. The entire Court in the *Caldarola* case, *supra*, reaffirmed this holding of the *Hust* case, *supra*, although considering a different question.

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* Words in parentheses added.

CONCLUSION

Petitioner has failed to present any basis in law or in fact why the principle laid down by this Court in the *Hust* case, *supra*, and reaffirmed in the *Caldarola* case, *supra*, should be reversed. Indeed, the passage of time has rendered moot the considerations which are urged as the basis for such reversal. Questions of sovereign immunity and national interest with reference to the operation by General Agents of Government owned vessels are matters for Congressional consideration. The Solicitor General, representing the Executive branch of the Government, seeks to have the Judiciary perform a function which would seem to be within the province of Congress. This Court should not be asked to give a forced intent to an Act of Congress in the absence of a "clear and unequivocal command."

The very fact that there is so much difference of opinion as to Congressional intent in the passage of the Clarification Act should impel this Court to continue with its expressed liberal view in treating with the rights of seamen.

(In reliance on this Court's decision in the *Hust* case, *supra*, McAllister did not file a claim against the Government and is now time-barred from proceeding in Admiralty against the United States of America.)

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Respondent.

JACOB RASSNER,
Of Counsel.

JACK STEINMAN,
ROBERT KLONSKY,
On Brief.

Exhibit A

81ST CONGRESS
1ST SESSION

H. R. 483

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1949

Mr. LANE introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To extend the time limit within which certain suits in admiralty may be brought against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741-745), approved March 9, 1920, is amended to read as follows:

"SEC. 5. That suits as herein authorized may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this Act it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States

brought hereunder within one year after the enactment of this amendatory Act if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest."

Exhibit B

80TH CONGRESS
2D SESSION

H. R. 4873

IN THE SENATE OF THE UNITED STATES

JUNE 9 (legislative day, JUNE 1), 1948

Read twice and referred to the Committee on the Judiciary

AN ACT

To extend the time limit within which certain suits in admiralty may be brought against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741-745), approved March 9, 1920, is amended to read as follows:

"SEC. 5. That suits as herein authorized may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this Act it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States

brought hereunder within one year after the enactment of this amendatory Act if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest."

Passed the House of Representatives June 8, 1948.

Attest:

JOHN ANDREWS,
Clerk.